



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA**

**AT MOMBASA**

**CAUSE NO. 800 OF 2017**

**NANCY CHAO MBELE.....CLAIMANT**

**- VERSUS -**

**FIRST ASSURANCE COMPANY LIMITED.....RESPONDENT**

(Before Hon. Justice Byram Ongaya on Friday 3<sup>rd</sup> December, 2021)

**JUDGMENT**

The claimant was employed by the respondent as a receptionist effective 01.08.2002 and later promoted to a Front Office Assistant at Kshs. 84, 548.00. The claimant received the letter to show cause dated 21.02.2017. The letter referred to an incident that occurred on 16.04.2016 at the Mombasa Branch where a client visited the respondent's offices and paid Kshs.20, 000.00 for extension of cover. The letter stated that the claimant issued a receipt for the same payment on 26.05.2016 being more than a month after the paid date and contrary to the respondent's procedures. The letter stated that the act amounted to gross misconduct warranting disciplinary action up to and including summary dismissal. The claimant was required to show cause why disciplinary action should not be taken against her and to respond by 5.00pm of 23.02.2017.

The claimant replied by her letter dated 22.02.2017. She explained that as earlier explained, she received the cash on the said date and kept the money in a sealed envelope together with a complimentary slip and a copy of the certificate to hand it over on Monday since there was no cashier on that Saturday. Further she was going through a depressing moment, something that made her not to remember that there was money in her handbag. The incident therefore slipped her mind completely. She then was away for a month on leave since she needed a rest. While in the village at the time she was informed about the cash and that was when she remembered. She was far but the cash was locked in her house in a handbag and she made arrangements for the cash to be paid immediately. When she resumed duty she brought the bag and the envelop intact and the branch manager acknowledged and took the complimentary slip and the copy of certificate and handed the money to the claimant stating that the debt was already settled. Two months later she received an email from the Risk Manager to again explain about the Kshs.20, 000.00. she then stated, **"This I did and apologised since it was my mistake. I will appreciate your response to have this case settled. Once again, my apologies for any inconveniences caused."**

By letter dated 27.02.2017 the respondent invited the claimant to a disciplinary hearing at 10.00am on 03.03.2017 and she was entitled to be accompanied by a colleague of her choice. The claimant attended and was given an opportunity to explain herself. She stated that she was not aware of the policy on handling cash. She concluded, **"Whatever happened is in the past and I know I was on the wrong and it affected the Company policy and I am sorry. It will never happen again."** One of the panellist one Joyce Kariara (JK) stated thus, **"We need clear procedures at FA on such issues and any other relevant issues to be given to us."**

The claimant was terminated by the letter dated 15.03.2017 with payment of one month pay in lieu of notice and per the terms of service. The reason for termination was the failure to issue a receipt for the Kshs.20, 000.00 on 16.04.2016 and issuing it on 26.05.2016, a month after the paid date. She appealed against the dismissal upon the grounds:

a. The respondent had no policy, procedure, regulation or rule which provided that a client must be issued with a receipt immediately the payment is made. Indeed, in many occasions she had received money from clients and issued them with complimentary notes and then latter followed up with the cashier for the receipt to be issued. That was totally acceptable to the respondent and was applicable in situations where the cashier was not available or receipt could not be issued immediately and, she had never faced disciplinary action in that regard.

b. She signed another contract of service on 04.10.2016 which referred to Regulatory Compliance and Dealing Rules and Regulatory and Compliance Policies. The Policies and Rules had never been availed to her Mombasa Branch where she worked from and she had never been made aware of the same. The second contract prescribed a training she was to attend and which was relevant to her work but she was net afforded a training opportunity even once. She stated, **"I was therefore surprised when you terminated my**

**employment on the basis that I failed to issue a receipt contrary to company procedures which were neither availed to me nor was I made aware or trained on. The reason for your termination is therefore unfair and I hereby appeal against the same. I hereby request for a copy the Company Procedures which I purportedly acted against and let me know when and how I was made aware of the same and whether I signed them. I also request for a copy of the minutes of the Disciplinary Hearing conducted on 3<sup>rd</sup> March 2017. I hope you will reconsider your decision. Please let me have your written communication on this appeal within 10 days.”**

She was invited to the appeal hearing per the respondent’s letter dated 03.04.2017 and fixed for 09.00am on Friday 07.04.2017 and at liberty to be accompanied by a union colleague or union representative. The claimant wrote on 04.04.2017 stating that she’d not attend because the notice was too short and she would attend only upon conditions that documents she requested for in her appeal letter are provided; the panel is reconstituted from the earlier one which had already heard her; she did not belong to a union and she be allowed to appear with a colleague not necessarily being unionisable; and her travel to Nairobi is facilitated since she had not been paid her dues per the letter of termination. She requested for a 2 weeks’ notice prior to the date fixed for hearing the appeal.

The respondent replied by the letter dated 11.04.2017 that the panel would change except for the secretary remaining Grace Muchai; minutes of the meeting of 03.03.2017 were being forwarded; she was to make personal arrangements to travel to the venue and the meeting was being rescheduled to 19.04.2019 and she was entitled to be accompanied by any of the respondent’s employees of her choice. The claimant endorsed on the letter she would be away from Mombasa for Easter and the meeting be rescheduled after the next week. The respondent then issued the letter dated 24.04.2017 conveying that the claimant had failed to attend the appeal meeting held on 19.04.2017 at which the termination decision had been discussed. It was noted that she had failed to attend the appeal and consequently the termination decision was upheld and that decision was final. The claimant wrote the letter dated 08.05.2017 stating that she was now back in Mombasa and she was willing and available on 12.05.2017 to attend the appeal hearing and asked for the copy of the procedures she allegedly acted against.

The claimant has filed the memorandum of claim on 06.10.2012 through Oluga & Company Advocates. She claims that her termination was unfair because the reason was not valid; the respondent did not have any policies and procedures on handling of cash and alleged breach of such policies was not factual; it was unfair to terminate her upon allegations about non-existing policies; she was not heard on her appeal; she had served for over 15 years and she deserved better treatment. She prayed for judgment against the respondent for:

- a. A declaration that the termination of her employment was unfair.
- b. Kshs. 1, 014, 576.00 being 12 months’ compensation for unfair termination.
- c. Costs of the suit.
- d. Any other order the Honourable Court may deem just to grant.

The respondent filed the memorandum of response on 01.03.2018 through the Federation of Kenya Employers. The respondent urged that the termination was procedurally fair and the reasons were valid. Further there was a memo issued on 28.05.2014 to the effect that cash received was to be declared and receipt completed to that effect on a daily basis by 12.00pm and the claimant breach that policy.

The respondent prayed that the claimant’s suit be dismissed with costs. The claimant testified to support her case and the respondent’s witness (RW) was Elias Kariuki, the Risk Manager. Final submissions were filed for the parties. The Court has considered all the material on record and makes findings as follows:

**First**, the Court finds that parties were in a contract of service. The respondent had employed the claimant as a Front Office Assistant at KShs. 84, 548.00 per month.

**Second**, the claimant’s employment contract was terminated by the letter dated 15.03.2017 and on account of belated receipting of the KShs. 20, 000.00 the claimant had failed to receipt for about a month from the date she had kept it in an envelope in her bag.

**Third**, the respondent afforded the claimant due procedure of a notice and a hearing. She was also given chance to appeal. By her own design she failed to attend the hearing of the administrative appeal even after the respondent had adjourned it the initial time to accommodate some of her concerns.

**Fourth**, was the reason for termination valid or was vitiated for want of respondent’s policy for handling cash payment? The claimant testified that it was in her job description and therefore duty to receive money and to take it to the accountant. There is no dispute that on the material Saturday she received the KShs. 20, 000.00 and the accountant (cashier) not being present, the claimant secured the cash in an envelope kept in her bag. Come Monday, she says she had been under stress that she forgot about the cash and did not hand the cash to the accountant but then she proceeded on leave for about a month and especially in view of her stressful times. The Court has no reason to doubt the claimant’s evidence that the respondent had a practice of belated receipting of cash and further the respondent had not communicated to her any policy on handling cash. Section 10 of the Employment Act required the respondent to prepare a written contract providing for, inter alia, the form and duration of the contract and which the Court holds to include the employer’s operational requirements attached to the employee’s service. Section 10(7) of the Act places on the respondent the burden of proving and disapproving an alleged term of employment. The Court finds that the respondent has failed to discharge that burden with respect to the existence of cash handling policy. The Court finds that indeed, as at the time of the disciplinary case against the claimant, the said cash handling policy did not exist and had not been communicated to the claimant at all and at the disciplinary hearing the panellist one Joyce Kariara (JK) stated thus, “**We need clear procedures at FA on such issues and any other relevant issues to be given to us.**” That confirms that the procedures did not exist and had not been given to staff. When the claimant presented her appeal she demanded to be provided the policies in issue but that was never done. The Court finds it was because the same did not exist. The respondent relied on the internal memo dated 28.05.2014 by the Managing Director Stephen M Githiga to Branch Admin Assistants & Cashiers on receipt declaration forms stating that the attached declaration form

was to be completed on daily basis by 12.00pm and the completed form be sent via email to Senior Accountant and copied to Risk and Audit Manager. The Court finds that the claimant was not one of the persons or employees it was addressed to and the internal memo was not signed – thus carrying improbable value that it issued and its content was authentic. The Court returns that the policy had not been communicated to the claimant at all and it appears to have not existed at all. As testified for the claimant, the respondent had therefore handle cash payments casually and as per her testimony, **“One would handle the cash and do with it as required. Money was handled casually. For 14 years I had a clean record of service.”**

The Court finds that per section 45(2) of the Act, a reason for termination is valid if it is fair because it relates to the employee’s conduct, capacity or compatibility or, is based on the employer’s operational requirements. The Court finds that the reason for the termination in the instant case was not valid and fair because it has not been shown to have related to the respondent’s operational requirements and in particular, the invoked cash handling procedure or policy has not been shown to have existed and brought to the claimant’s attention. Further, the reason did not relate to the claimant’s misconduct or want of compatibility or capacity because within that respondent’s deficiency in operational requirements, policies or system, the claimant was endeavouring to do her best. It was not suggested that there was any intention on her part to steal or convert the Kshs. 20, 000.00 and there was no evidence to discredit her evidence that at the material time she was under depression and she had therefore taken a month’s leave to recover from the stress. The Court considers that her oversight was excusable and it was not shown to have been in bad faith especially that once it was brought to her attention, she promptly acted correctively.

In that regard and of deficient employer’s operational systems or requirements the court upholds its opinion in Grace Gacheri Muriithi – Versus- Kenya Literature Bureau (2012) eKLR thus, **“To ensure stable working relationships between the employers and employees, the court finds that it is unfair labour practice for the employer to fail to act on reported deficiencies in the employer’s operational policies and systems. It is also unfair labour practice for the employer to visit upon the employee adverse consequences for losses or injury to the employer attributable to the deficiency in the employer’s operational policies and systems. The court further finds that it would be unfair labour practice for the employer to fail to avail the employee a genuine grievance management procedure. The employee is entitled to a fair grievance management procedure with respect to complaints relating to both welfare and employer’s operational policies and systems. The court holds that such unfair labour practices are in contravention of Sub Article 41(1) of the Constitution that provides for the right of every person to fair labour practices. Further the court holds that where such unfair labour practices constitute the ground for termination or dismissal, the termination or dismissal would invariably be unfair and therefore unjust.”**

In the instant case there was no loss but only a delay in receipting the Kshs. 20, 000.00 and handing the cash to the respondent and occasioned by the claimant’s oversight due to her stressful times and largely due to the respondent’s non-existent or defective cash handling policy and procedures. The termination was unfair for want of a valid and fair reason as envisaged in sections 43 and 45 of the Act. The claimant’s submissions are upheld in that regard.

**Fifth**, is the claimant entitled to full compensation under section 49 of the Act as prayed for? The Court has considered the factors in the section. The claimant had over 14 years of clean service. She desired to continue in employment. The belated receipting and handing in of the Kshs. 20, 000.00 has been shown to have been a joint contribution by the parties being the claimant’s personal stress and the respondent’s deficient operational cash handling procedure. The claimant has established valid grievances against the respondent that she was not trained and the policies were not made known to her. But the Court also considers that the claimant also contributed to her ultimate predicament when she failed to attend the appeal hearing even after the respondent afforded her a second chance.

The Court returns that six months’ salaries in compensation will balance justice for the parties making Kshs. 84, 548.00 x 6 thus **Kshs. 507, 288.00**. The respondent will pay the claimant’s costs of the suit.

In conclusion judgment is hereby entered for the claimant against the respondent for:

1. Payment of **Kshs. 507, 288.00** by 15.01.2022 failing interest to be payable thereon at Court rates from the date of this judgment till full payment.
2. The respondent to pay the claimant’s costs of the suit.

**SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT MOMBASA THIS FRIDAY 3<sup>RD</sup> DECEMBER, 2021**

**BYRAM ONGAYA**

**JUDGE**